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No. 04-223

Supreme Court, U.S.
FILED
NOV 2 - 2004
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

CHURCH OF THE AMERICAN KNIGHTS OF THE KU KLUX KLAN, REVEREND JEFFERY L. BERRY, and JANE DOE AND RICHARD ROE,

Petitioners,

-against-

RAYMOND W. KELLY, Commissioner of the Police Department of the City of New York, and THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
Attorney for Respondents,
100 Church Street,
New York, New York 10007.
(212) 788-1070

LEONARD J. KOERNER,*
RONALD E. STERNBERG,
of Counsel.
*Counsel of Record

COUNTER STATEMENT OF THE QUESTIONS PRESENTED

1. Whether New York's anti-mask law, which prohibits the masked petitioners from gathering in a public forum, violates the First Amendment's protection of anonymity.

2. Whether New York's anti-mask law, which regulates content rather than speech, is facially invalid for distinguishing between types of conduct.

3. Whether New York's anti-mask law, which, as applied to petitioners, does not burden pure speech or expressive conduct, unconstitutionally burdens petitioners' viewpoint.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents request that this Court deny the petition for a writ of certiorari seeking review of the Second Circuit's unanimous opinion in this case. The opinion is reported at *Church of the American Knights of the Ku Klux Klan v. Kerik*, 356 F3d 197 (2d Cir. 2003), and is reproduced in the appendix to the petition at pages 3a

through 25a. In an order entered May 20, 2004 (1a-2a),[1] the Second Circuit panel that decided the appeal unanimously denied petitioners' petition for rehearing. The order further noted that upon petitioners' petition for rehearing en banc, "no ... judge has requested that a vote be taken thereon" (2a).

COUNTER STATEMENT OF FACTS

Respondents adopt, and respectfully refer the Court to, both the Background portion of the Second Circuit's opinion (356 F3d at 199-203 [4a-12a]) and to that Court's analysis of the of the statute in issue, New York Penal Law, section 240.35(4). 356 F3d at 203-05 (12a-14a). Upon such analysis, the Second Circuit concluded that "New York's anti-mask law was ... indisputably aimed at deterring violence and facilitating the apprehension of wrongdoers; the parties agreed, and the District Court properly held, that the statute was not enacted to suppress any particular viewpoint." 356 F3d at 205 (14a).

REASONS FOR DENYING THE WRIT

A. The Second Circuit correctly determined that the masked expression of petitioners' views in a public forum is not encompassed within the First Amendment's protection of anonymity.

Of the three questions posed in the petition, restated by respondents, only the first suggests even a colorable certworthy issue. In this regard, however, there is no merit to petitioners' contention that the Second Circuit "seriously misconstrued this Court's jurisprudence" (Pet., at 9) insofar as it "decline[d] the [petitioners'] request to extend the holdings of *NAACP v. Alabama* [357 US 449 (1958)] and its progeny and to hold that the concealment of one's face

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[1] Parenthetical references appearing as "__a" are to pages of the appendix annexed to the petition.

while demonstrating is constitutionally protected." 356 F3d at 209 (21a).

The Second Circuit correctly noted that this Court "has never held that freedom of association or the right to engage in anonymous speech entails a right to conceal one's appearance in a public demonstration. Nor has any Circuit found such a right." 356 F3d at 209 (21a). Thus, the Court recognized that adoption of petitioners' contention would constitute an inappropriate and unwarranted extension of this Court's holdings. Contrary to petitioners' suggestion, there are factual and legal distinctions "between exposure of one's name and revealing one's appearance" (Pet., at 12). Indeed, it is safe to assume that the protected distribution of anonymous handbills (*see Talley v. California*, 362 US 60 [1960]) and campaign literature (*see McIntyre v. Ohio Elections Commission*, 514 US 334 [1995][*"McIntyre"*]) was not undertaken by individuals masked to conceal their identities.[2]

The Second Circuit was properly cognizant of the significant law enforcement purposes served by section 240.35(4), particularly relevant in post-9/11 New York City. The New York State Legislature has determined that public gatherings of masked individuals, in settings that are other than "a masquerade party or like entertainment," create, in and of themselves, unacceptable public safety hazards. As stated by a New York City Police Deputy Inspector, a 26-year veteran of the Police Department (A463):[3]

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[2] "[A]nonymity has often been assumed for the most pernicious purposes," and it is "neither an absolute social good, nor an absolute constitutional right." *State v. Miller*, 260 Ga 669, 675, 398 SE2d 547, 552 (1990).

[3] Numbers in parentheses preceded by "A" refer to pages of the joint appendix filed in the Second Circuit. Bracketed numbers, if

> "An individual assured of total anonymity in a crowd situation is more likely to act in an unruly manner because of his or her belief that there will be no accountability for their [sic] actions. One who anticipates discovery and consequences will be less likely to become unruly, commit a criminal act, or create an unsafe environment for the general public."

Critically important, also, is the necessity to identify wrongdoers. The Inspector explained (A463-64):

> "It is an essential element of crime prevention and public safety that the police, witnesses, and victims be able to identify an individual who is acting in an unsafe or criminal manner. This prevents dangerous or criminal situations from developing....
>
> "... Conditions in crowd control, crime prevention and public safety become even more compelling where individuals are masked. The apprehension of an unruly masked individual becomes more difficult and the possibility of identification becomes next to impossible for law enforcement.
>
> "Facial recognition is an essential element for witness and law enforcement identifications. Facial anonymity in a group can create a total shield to apprehension and may embolden a group or individual to engage in criminal activity. Where a group is organized with a cohesive mission and the

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any, refer to pages of the deposition transcripts, reproduced, as originally submitted to the District Court, six to a page of the joint appendix.

> ability to identify is impaired, the potential for unsafe conditions or criminal conduct increases."

Upon this record, the Second Circuit concluded (356 F3d at 209 [22a]):

> "While the First Amendment protects the rights of citizens to express their viewpoints, however unpopular, it does not guarantee ideal conditions for doing so, since the individual's right to speech must always be balanced against the state's interest in safety, and its right to regulate conduct that it legitimately considers potentially dangerous. Because 'every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities,' a conduct-regulating statute of general application that imposes an incidental burden on the exercise of free speech rights does not implicate the First Amendment."

The Second Circuit's determination was correct on the law and on the facts, and it is not in conflict with any decision either of this Court or of another Circuit. Petitioners' contention thus does not present any issue necessitating this Court's review and, in any event, is without merit. The petition should be denied.

In light of its conclusion that petitioners' "right to anonymous speech is not implicated here" (356 F3d at 209 [22a]), the Second Circuit did not consider petitioners' argument, reiterated here, that section 240.35(4) fails the "'exacting scrutiny'" test (Pet., at 12). We demonstrated in the Second Circuit that petitioners' contention is meritless.

Even a "significant interference" (*Buckley v. Valeo*, 424 US 1, 25 [1976][internal quotation marks omitted]["*Buckley*"]) with the "protection of anonymity" will be sustained "if it is narrowly tailored to serve an overriding state interest." *McIntyre, supra*, 514 US at 347. The District Court erred in concluding that such test was not satisfied in the instant case.

In assessing the constitutionality of section 240.35(4), it is significant to recognize what it does not do. Most particularly, nothing in the record indicates that the statute inhibits free association in the petitioner organization. See *NAACP v. Alamaba, supra*, 357 US at 460. To the contrary, petitioner Berry, the Imperial Wizard (national leader) of the American Knights, testified that he had not received any indication from any of the members "that they would no longer be members of the American Knights if they could not wear masks in New York City" (A498 [182-83]).

Indeed, Berry acknowledged that membership had increased after the New York City rally (A471 [20-21]), and, according to former plaintiff James W. Sheely, the local Grand Dragon, 50 per cent was a "fair estimate" of the increase in local membership subsequent to the rally (A523 [167]). Several of the members who testified at depositions had affiliated with the American Knights after the rally (see, A794).

The statute does not proscribe the anonymous distribution of anonymous literature. One member told of literature distributions "late at night when people are sleeping and no one sees us" (A589). Pamphlets are placed on automobile windshields, in gates and in newspaper delivery boxes (*id.*). During these distributions, no part of the traditional costume is worn (A589-90). Significantly, too, because section 240.35(4) precludes only "congregat[ing] in a public place with other persons so masked," any single masked individual may distribute

anonymous American Knights literature with impunity.[4] Moreover, general dissemination of the message of the American Knights, whether or not anonymously, is not inhibited by section 420.35(4). The organization has a web site (see, A481-82 [85-86]), and some of its members give media interviews (A533 [168]).

Finally, the statute obviously does not preclude public gatherings of the American Knights. Pursuant to the Second Circuit's interpretation of the statute on petitioners' motion for a preliminary injunction, 17 robed and hooded, but unmasked, members gathered at a prominent New York City location on October 23, 1999. Their messages, apparently, were understood by the 4,000 people who gathered to oppose them.

Upon such circumstances, section 240.35(4) withstands "'exacting scrutiny.'" *McIntyre*, *supra*, 514 US at 347. In this regard, it is not relevant that, as noted by the District Court, there is no evidence that there was any reason to believe that "the members of the American Knights would engage in unlawful behavior" (39a). The statute is a prophylactic measure, intended to eliminate a perceived inducement and prelude to unlawful behavior. It is applied in a content-neutral manner to all those who would gather in a public forum. It is not, as suggested by the District Court, a "blunderbuss approach" (*id.*), but, rather, the only approach that addresses the twin compelling governmental interests that mask-wearing implicates, preventing violence and identifying and apprehending criminals.

In a manner similar to that noted by this Court in *Buckley*, "[i]t is undoubtedly true" (424 US at 68) that the

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[4] The New York City Police Department interprets the statute "to require three persons or more to be masked in order for the provision to be violated" (A785). Earlier versions of the statute explicitly incorporated the "three or more persons" requirement.

prohibition against public mask-wearing might deter some (but certainly not all) members of the American Knights from attending public rallies. "In some instances, disclosure might even expose [participants] to harassment or retaliation." *Id.* However, while "[t]hese are not insignificant burdens on individual rights ... they must be weighed carefully against the interests which [the Legislature] has sought to promote by this legislation." *Id.*

On the record presented, particularly the fact that the American Knights may continue to advocate and proselytize, and even do so anonymously, New York's compelling interests in effective law enforcement and insuring public safety outweigh any burdens on petitioners' free speech. The content-neutral statute is necessarily related to, and is narrowly drawn to proscribe, precisely "the danger sought to be prevented."[5] *McIntyre, supra,* 514 US at 357. As such, and contrary to the District Court's conclusion, section 240.35(4) survives petitioners' challenge predicated on their alleged right to anonymous speech.

B. The Second Circuit correctly determined that New York's anti-mask law, which regulates content rather than speech, is not facially invalid for distinguishing between types of conduct.

As petitioners recognize (Pet. at 15-16), their second question requires this Court to ignore the Second Circuit's holding that "the wearing of masks by members

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[5] The District Court missed the point when it suggested that if masks are to be worn, the police can "insure proper security measures are in place and assign additional officers to curtail any increased risk of disruption" (40a). The Legislature concluded that the prohibition on public mask-wearing helps to avoid even the possibility of disruption. More importantly, increasing the number of police officers does not insure identification of masked wrongdoers by the police, witnesses or victims.

of the American Knights is *not* expressive conduct that implicates the First Amendment." 356 F3d at 209-10 (23a) (emphasis in original). The Court's reasoning, well-supported by the record, was that the optional mask that petitioners seek to wear "does not convey a message independently of the robe and hood." 356 F3d at 206 (16a). The Court said (356 F3d at 206-07 [footnotes omitted][16a-17a]):

> "[S]ince the robe and hood alone clearly serve to identify the American Knights with the Klan, we conclude that the mask does not communicate any message that the robe and the hood do not. The expressive force of the mask is, therefore, redundant.
>
> "Not only is the message conveyed by the mask duplicative of the robe and hood, we think the mask adds no expressive force to the message portrayed by the rest of the outfit. The mask's asserted message is already being conveyed unequivocally: Inasmuch as the robe and hood draw an association between the American Knights and the Klan that is clear and unmistakable to any viewer, the addition of the mask cannot make that association any clearer. A witness to a rally where demonstrators were wearing the robes and hoods of the traditional Klan would not somehow be more likely to understand that association if the demonstrators were also wearing masks. The American Knights offered no evidence or argument to the contrary."

Upon such finding, the Court held (356 F3d at 208 [19a]):

> "[W]here, as here, a statute banning conduct imposes a burden on the wearing of an element of an expressive uniform, which element has no independent or incremental expressive value, the First Amendment is not implicated, and a balancing of interests under *United States v. O'Brien*, 391 US 367, 377 ... (1968), is unnecessary."[6]

Petitioners provide absolutely no basis for disturbing the Second Circuit's well-reasoned conclusion that section 240.35(4), "far from restricting expression based on its message, is not restricting protected expression at all." 356 F3d at 210 (23a). The Second Circuit's refusal to "second-guess the apparent legislative determination that mask wearing at entertainment events does not pose the same security risks as mask wearing in other circumstances" (*id.*) does not present an issue for review by this Court.

Section 240.35(4) is content-neutral, and the statutory exception for permitted public mask-wearing is context-, not content-, based. In this regard, petitioners' reliance on *Consolidated Edison Company v. Public Service Commission*, 447 US 530 (1980), is misplaced. Clearly distinguishing that case is the fact the defendant therein "d[id] not pretend that its action [was] unrelated to the content or subject matter of bill inserts." 447 US at 537.

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[6] In their appellants' brief in the Second Circuit (at 17-35), respondents argued that even assuming the correctness of the District Court's conclusion that petitioners' masks constitute expressive conduct, section 240.35(4) satisfies *O'Brien's* four-factor test. It is, therefore, constitutionally valid as a permissible restriction on symbolic expression and/or as a reasonable time, place or manner restriction on expression symbolized by conduct.

Contrary to petitioners' erroneous interpretation, Section 240.35(4) does not "privilege social and theatrical expression over ideological expression" (Pet., at 18). Rather, the statute, wholly without regard to expressive content, permits mask-wearing in certain clearly identified situations and bans it in all others. It is only the circumstance of the mask-wearing that is critical. And, so it is that masked American Knights may participate in the New York City Halloween Parade without risk of arrest under, indeed, protected by, section 240.35(4).

C. The Second Circuit correctly determined that New York's anti-mask law, which, as applied to petitioners, does not burden pure speech or expressive conduct, does not unconstitutionally burden petitioners' viewpoint.

Petitioners' original Fourteenth Amendment claim, as alleged in the complaint (see, A183), that they were denied equal protection as a result of "selective enforcement," evolved into a claim of "viewpoint discrimination" in violation of the First Amendment. The Second Circuit's cogent rejection of both claims (356 F3d at 210-11 [23a-25a]) is correct in all respects and does not raise any issues warranting further review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
October 28, 2004

Respectfully submitted,

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
Attorney for Respondents,
100 Church Street,
New York, New York 10007.
(212) 788-1070

LEONARD J. KOERNER,*
RONALD E. STERNBERG,
of Counsel.

*Counsel of Record